



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 240 OF 2016

ISHUMAIL MCHOMBO IHA.....CLAIMANT

VERSUS

BADAR HARDWARE LIMITED.....RESPONDENT

RULING

1. On 7th February 2019, I delivered judgment in favour of the Claimant in the sum of Kshs. 331,617 plus costs and interest.
2. Subsequently, the Respondent filed an application by way of Notice of Motion dated 24th May 2019 seeking the following orders:
 - a) Stay of further proceedings including but not limited to taxation of the Claimant's Bill of Costs;
 - b) Setting aside of the *ex parte* proceedings taken on 9th April 2018;
 - c) Leave to the Respondent to defend the claim.
3. The application, which is supported by the affidavits of Peter Omwenga, Advocate and the Respondent's Human Resource Manager, Fredrick E.M. Ondako, is based on the following grounds:
 - a) That the Respondent demonstrated its intention to defend this cause and filed a Response to the Memorandum of Claim on 10th June 2016;
 - b) That the Respondent filed a witness statement by Fredrick E.M. Ondako on 14th February 2018;
 - c) That the cause was listed for hearing on 4th April 2018;
 - d) That the Advocate for the Respondent failed to diarise the matter by an inadvertent and genuine mistake on his part;
 - e) That the cause proceeded *ex parte* and an award of Kshs. 331,617 plus interest was made on 7th February 2019;
 - f) That subsequently the Claimant filed a Bill of Costs;
 - g) That the mistake of an Advocate should not be visited upon the Respondent which now stands condemned to liquidate the award without having been heard;
 - h) That in the interest of justice, the Respondent asks the Court to re-open the cause and allow it to cross examine the Claimant;
 - i) That the orders sought herein, if granted, shall not occasion any prejudice to the Claimant who can be compensated by thrown away costs;
 - j) That it is in the interest of justice that the Court is persuaded to set aside the *ex parte* judgment;
 - k) That the application has been filed without delay and is not a subversion of justice.
4. The Claimant's response is by way of Replying Affidavit sworn by his Counsel, Richard Mbuya Advocate on 25th September 2019.

Counsel depones that the Claimant instituted this claim vide Memorandum of Claim dated 8th February 2016 seeking compensation for wrongful dismissal.

5. Summons and pleadings having been duly served, the Respondent entered appearance and filed its Statement of Response through the firm of Mogaka Omwenga & Mabeya Advocates.

6. Counsel adds that on 25th January 2018 he and Mr. Mogaka appeared before the Court and fixed the matter for hearing on 9th April 2018 on which date there was no appearance for the Respondent. The case proceeded *ex parte* and the matter was scheduled for mention to confirm filing of submissions on 7th May 2018.

7. Counsel further depones that a mention notice was served upon the firm of Mogaka Omwenga & Mabeya Advocates but they did not attend court. A further mention was fixed for 9th July 2018 and thereafter the matter was mentioned severally to confirm filing of submissions but the Respondent did not file any submissions nor did it appear to challenge the closing of their case.

8. Counsel points out that judgment was delivered on 7th February 2019 and no appeal or application for review had been filed by the Respondent. The Claimant's Bill of Costs dated 31st March 2019 was filed and served but the Respondent ignored it.

9. The Claimant's case is that the Respondent has not met the standards for setting aside of judgment for the following reasons:

- a) The Court has already pronounced itself in the matter and is therefore *functus officio* and cannot re-open the case;
- b) The Respondent has not given any security to compensate the Claimant by way of costs;
- c) The Respondent has not given a good reason to warrant the setting aside of the judgment of the Court.

10. The Claimant's Counsel maintains that a case belongs to the litigant and not their Advocate. He adds that the present application is actuated by malice and is a desire to ensure that the Claimant does not enjoy the fruits of his judgment.

11. The single issue for determination in this application is whether the Respondent has made a case for setting aside of the judgment delivered by this Court on 7th February 2019.

12. As reiterated by the Court of Appeal in ***Kwanza Estates Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 others [2019] eKLR*** the power of the court to set aside an *ex parte* judgment is discretionary.

13. Judicial discretion is not whimsical; it must be grounded on sound and reasonable grounds. All the Respondent states is that its Counsel failed to diarise the hearing date. Significantly, the Respondent did not bother to produce an extract of the diary to back the averments made in this regard.

14. What is more, the Respondent ignored the directions of the Court to file final submissions and did not bother to respond to the Claimant's Bill of Costs. This is not a party who merits the exercise of discretion in its favour.

15. The Respondent's application dated 24th May 2019 is therefore dismissed with costs to the Claimant.

16. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF DECEMBER 2019

LINNET NDOLO

JUDGE

Appearance:

Mr. Mbuya for the Claimant

Mr. Mogaka for the Respondent